

Contracts Outline: Armadillos From Texas Play Rap Eating Tacos (Applicable Law, Formation, Terms, Performance, Remedies for unexcused performance, Excuse of non-performance, Third party problems)

## **I Applicable Law: Either Common Law or Art 2 UCC (if for the sale of goods).**

### A) Applicability of Article 2: UCC

- 1) Does not apply to: transfers of real estate (E.g., contracting to buy a house) AND Service Ks (E.g., wash car)
- 2) In agreements containing both a sale of goods & a service element: consider the 'more important part' of the K. If service → CL applies. If sale of goods → Art 2 UCC applies. (E.g., K to buy a car w/2 parking lessons. Imp part of the deal is sale of car. UCC; E.g., K to buy a yo-yo w/10 lessons. Imp part of deal is service so CL applies).
  - (a) Exception: if "K divides payment" apply UCC to sale of goods & CL to rest (E.g., K states B will pay \$10 for yo-yo & \$100 for services. Divides payment. UCC applies to yo-yo & CL for services).

## **II FORMATION OF A K: Requires Mutual Assent (Offer & Acceptance), Consideration/substitute, & No defenses to formation**

### A) General Definition of A K & Types of Ks

- 1) K: is a legally enforceable agreement for performance of which the law recognizes a duty & for breach of which the law provides a remedy.
- 2) Types of Ks:
  - (a) Express Ks (formed by language, either oral/written)
  - (b) Implied Ks (formed by manifestations of assent other than oral/written language – conduct. E.g., X fills car at gas station. Implied K for purchase of gas; X watches Y paint her house knowing Y expects to be paid.
  - (c) Quasi K: K law does not apply. Provides an equitable remedy when 1) P has conferred a benefit on D 2) P reasonably expected to be paid & 3) D would realize unjust enrichment if P could not recover the value of the benefit she conferred to D.
  - (d) Bilateral v Unilateral:
    - (i) Bilateral: Ks require an exchange of promises. Most Ks are bilateral.
    - (ii) Unilateral Ks: require the exchange of an act for a promise. Arise where 1) offeror indicates that performance *is the only manner of acceptance* or 2) where there is an offer to the public contemplating acceptance by performance (E.g., reward offer).
  - (e) Void, voidable & Unenforceable Ks: Void Ks: no legal effect (E.g, agreement to commit crime); voidable Ks (one prty may elect to avoid/ratify. E.g., K by minor). Unenforceable: Valid but defense to formation (E.g., SOF)

### B) Offers:

- 1) Blurb: Creates a power of acceptance in the offeree + is an objective manifestation of present intent to enter into a legally enforceable agreement. To be valid, the offer must be 1) expression of promise, undertaking or commitment to enter into conduct 2) definite & certain in its terms & 3) communicated to the offeree.
- 2) Promise, Undertaking or Commitment As opposed to mere preliminary negotiations: Consider 1) language used 2) surrounding circumstances 3) prior relationship bw parties 4) Method of communication 5) Custom in industry & 6) Degree of definiteness & certainty of terms.

- (a) E.g., advertisements are NOT offers EXCEPT: 1) if in nature of a reward 2) specific as to quantity & expressly indicates who can accept. "E.g., 1 fur coat – first come, first served" offer.
- 3) Definite & Certain Terms: 1) Must identify the offeree 2) Whether sufficiently definite depends on kind of K. **Tip**: Offer not required to contain all material terms.
  - (a) Vague/ambiguous material terms not an offer neither under UCC nor CL. (Rationale: parties haven't worked it out, didn't mean for ct to fill in). E.g., X offers to sell her car to Y for a "fair," "reasonable," "appropriate" price. Not an offer.
  - (b) Type of K:
    - (i) Real estate transaction: Description of land & price terms required or no offer, even if use 'offer', just preliminary negotiation (E.g., A offers to sell Blackacre to B).
    - (ii) Sale of goods: quantity must be certain/capable of being made certain. Reasonable terms supplied by cts (price & time for performance).
      - (1) Reqs/output Ks: A K for sale of goods may state the quantity of goods to be delivered in terms of B's reqs or S's output in terms of exclusivity PROVIDED no unreasonably disproportionate increase.
        - a. **Tip**: trigger words "all," "only," "solely," "exclusively" (E.g., B offers to buy all its gas from S for 5 yrs. Valid. Determine if "unreasonably disproportionate" – rule of thumb – over 10%. E.g., B buys 1K lbs under output K 1<sup>st</sup> 3 yrs then orders 2K next yr. Unreasonably disproportionate increase)
      - (iii) Employment Ks: duration of employment must be specified.
- 4) Offer must be communicated to offeree
- C) Offer Must not have Terminated Before Offeree Has Accepted or it's 'dead': Offer may be terminated by either 1) act of either party or 2) operation of law
  - 1) Termination by Offerror:
    - (a) Unambiguous Words/Conduct by Offerror: Offerror revokes offer when 1) unambiguously directly communicates revocation to offeree or 2) unambiguously acts inconsistently w/continued willingness to maintain the offeree + offeree receives correct information of this + from a reliable source.
    - (b) Revocation becomes effective only when received by offeree. Revocation sent through mail not effective until offeree receives it. (but if offer was published, revocation requires & is effective on publication).
    - (c) Offerror has power to revoke at any time before acceptance – even if promises not to revoke unless power to revoke is limited under (4) situations:
      - (i) Option K supported by consideration: An offer cannot be revoked if the offeror has promised to keep the offer open AND the promise is supported by payment/other consideration.
      - (ii) UCC firm offer: An offer cannot be revoked for up to 3 months if 1) offer to buy/sell goods 2) it is a signed, written promise to keep the offer open & 3) if the party is a merchant (one who deals w/goods of this kind).
        - (1) If fails to set a date as to when it will be revocable, cts fix term but no longer than 3 mo.
          - Tip**: S is used cars dealer offers by signed writin to B to sell car. Can revoke bc no promise not to!

- (iii) Detrimental reliance: An offer cannot be revoked if there has been 1) reliance that 2) is reasonably foreseeable & 3) detrimental. E.g., Using subcontractor's bid
  - (iv) Unilateral K: the start of performance pursuant to an offer to enter into a unilateral K makes the offer irrevocable for a reasonable time to complete the performance. MERE Preparation is not performance. **Tip**: Any doubt of performance/preparation, choose preparation E.g., X offers to pay Y if Y paints X's home. X starts painting. Irrevocable v. X buys the paint & stirs it. Revocable).
- 2) Words/Conduct of the Offeree May Terminate the Offer:
- (a) Outright Rejection: Rejections effective when received. Once offer has been rejected, original offer no longer capable of being accepted unless offeror restates the offer.
  - (b) Lapse of time: may be terminated by offeree's failure to accept w/in time specified or reasonable period (if no time specified)
  - (c) Counteroffer: Terminates the offer & becomes a new offer. There is no K unless counteroffer accepted.
    - (i) Distinguish counteroffer from mere bargaining, which does not terminate offer: **Tip**: interrogative statements. E.g., "Will you take 10K?" Doesn't destroy original offer.
  - (d) Conditional Acceptance: Operates the same way as a counteroffer by terminating the offer and becoming a new offer. **Tip**: Trigger words, "if," "only if," "provided," "so long as," "but," or "on condition that." E.g., Offer contains nothing about ADR. Offeree says, "I accept provided ADR."
  - (e) Additional Terms to a K: CL v UCC. Determining whether Additional Terms Terminate the Original Offer or Result in K:
    - (i) CL: Under the mirror image rule, an "acceptance" that adds new terms is tx like a counteroffer rather than acceptance, thus terminating the original offer (E.g., adding ADR cl is counteroffer)
    - (ii) UCC: A response to an offer that adds new terms + but does not make the new terms a condition of acceptance + is tx as a valid "seasonable expression of acceptance" **Tip**: heavily tested. E.g., "Acceptance" includes ADR – still acceptance but if "only if ADR" counteroffer.
- (1) Determining whether UCC Additional Terms Become Part of the K:
- a. If at least one of the parties is not a merchant: the additional term is merely a proposal to be separately accepted or rejected
  - b. If both of the parties are merchants, the general rule is that additional term is part of the K. Exceptions: 1) it materially changes the offer or 2) if the offeror objects to the change
    - i. Examples:
      - III (E.g., X offers to sell Y his car. Y says "I accept. Deliver it Saturday." UCC. Additional terms don't defeat K bc not conditional. At least 1 party not merchant. Additional term is proposal).
      - IIII E.g., X & Y used car sale dealers. Y says, "I accept if delivered on Saturday." Counteroffer; E.g., X & Y used car sale dealers. I accept. Deliver it Saturday. Becomes part of terms bc doesn't materially change offer & offeror didn't object
    - ii. S/A: regarding different terms in the acceptance. Some cts treat them like additional terms (use above test) & others use "knock out rule"

- 3) Termination by Operation of law
  - (a) Death/insanity of either party: unless offer is of a kind the offeror can't terminate (e.g., an option K). No req death/insanity be communicated to either party
  - (b) Destruction of K's subject matter
  - (c) Supervening illegality
- D) Acceptance: Right to accept can't be assigned unless option K.
  - 1) General Rule: Acceptance Must be Communicated. Mailbox Rule: If acceptance is by mail/similar means + properly addressed/stamped – it's effective at moment of dispatch. But if improperly sent, it's effective only on receipt.
    - (a) All other communications only effective when received.
    - (b) Where Mailbox rule doesn't apply: **Tip**: Heavily Tested
      - (i) If the offer stipulates acceptance not effective until received
      - (ii) If option K (acceptance effective on receipt)
      - (iii) If offeree sends rejection & then sends acceptance. Whichever arrives first is effective.
      - (iv) If offeree sends acceptance & then rejection + rejection arrives first + offeror detrimentally relies on it (if no detrimental reliance: then mailbox rule applies)
      - (v) E.g.,: X receives offer from O to sell goods. On 1/10, X mails acceptance. On 1/11, X mails revocation. Is a K. Rejection didn't arrive first + no detrimental reliance; X sends letter of rejection & then a day later, a letter of acceptance. The rejection letter arrives first. No K
  - 2) Later conduct by the offeror that implies that a K exists even though improper response to offer.
    - (a) CL: If parties act as though there is a K, conduct is tx as an acceptance
    - (b) UCC: Such conduct is tx like a new K. The terms of the new K consist of all terms on which writings agree + any supplementary UCC terms (e.g. price)
      - (i) (E.g., L makes offer to T to lease. T adds cl, conditional acceptance is counteroffer. But L & T acts as though there is a K. CL applies: conduct is "acceptance;" B sells S skirts. S says "only if they fit." Counteroffer. But S acts as though K. Conduct creates new K. Limited to writings so "if they fit" not part of the K).
  - 3) The offeree may accept by fully performing. **Tip**: heavily tested
    - (a) Requirements: 1) there is a verbal offer but 2) no words in response & 3) only response is full performance. Full performance generally constitutes acceptance, but notice of performance may be required to obligate offeror to perform.
      - (i) Whether notice is required depends on: 1) what the offer itself requires & 2) whether offeree has reason to believe that offeror will not learn of her acceptance - when offeror lives in a different state. Must give notice.
      - (ii) **Tip**: Generally wrong answer – "Offeree can only accept an offer he knows about." If correct, only correct about reards. Doing the act rewarded w/o knowledge of offer not acceptance bc offer only effective on receipt.
  - 4) The offeree starts to perform: 1) Verbal offer 2) no response 3) only response is part performance.
    - (a) Unilateral K: Start of performance not treated as an acceptance bc completion of performance is required.
    - (b) Bilateral K: Start of performance is acceptance to enter into a bilateral K bc treated as implied promise to perform, thus there is a K.

- (c) E.g., Offeror offers P \$1000 to pay house. P starts painting. P's part performance is acceptance & offeror can't revoke versus Offeror states that only way to accept is by performance. P starts painting. No acceptance unless performance completed/house painted & offeror can still revoke.
- 5) Words of Offer, Words of Acceptance but No Performance: Sufficient to Create a K bc most offers can be accepted by a promise to perform (most Ks, bilateral). Only unilateral Ks require full performance for acceptance & reward offers.
- 6) The seller of goods send the "wrong" goods. **Tip**: Heavily Tested
  - (a) Serves as both an acceptance of the offer AND a breach E.g., "Deliver 100 yellow widgets. X sends 99 yellow widgets. Sending wrong goods serves as both acceptance & breach" but if "sends 100 yellow widgets" – serves as acceptance.
    - (i) Exception: Accomodation/Explanation: Results in a counteroffer (so no K) and no breach. E.g., B orders 100 red widgets. S sends 99 yellow widgets & accommodates/explains "ran out, hope you can use these." No K bc sending wrong goods w/explanation results in counter-offer & bc no K, no breach.
- E) Consideration/Consideration Substitute
  - 1) General Rule: Cts will enforce a K only if it is supported by consideration or a substitute for consideration, or "bargained for legal detriment."
    - (a) **Tip**: Steps to finding consideration 1) Identify promise maker/breaker 2) Whether the person asked for something in exchange for her promise/bargained for something 3) What legal detriment did the person who is trying to enforce the promise sustain?
      - (i) E.g., L sends T a letter promising to renew the lease at same rental rate. T paints the apt. L charges higher. L didn't ask for anything in exchange – No consideration.
  - 2) Forms of Consideration 1) Performance – doing something not legally obligated to do 2) Forbearance – not doing something legally obligated to do 3) Promise to perform 3) Promise to forbear
    - (a) E.g., B promises to buy & S promises to sell Blackacre. Consideration for B's promise & for A's
  - 3) Consideration must not be:
    - (a) A mere gift: no bargain involved. Note: Adequacy of consideration not inquired into but can't be token consideration (devoid of value) or sham consideration (recited in K but not actually paid)
    - (b) Illusory: where only one party is bound to perform. **Tip**: Usually wrong answer. E.g., I promise to buy all you produce," v "I promise to buy all you want to sell me/all I want to buy – illusory.
    - (c) Past/Moral consideration: if given in exchange for something already done, not valid bc does not satisfy bargain requirement.
      - (i) Exception: Where past obligation is unenforceable bc of some technical defense (e.g., SOL) obligation will be enforceable if 1) new promise made in writing OR 2) partially performed or 3) a new promise to pay for the act enforceable if expressly requested AND w/expectation of payment.
        - (1) E.g., Abu saves Lisa's life. Homer offers to pay him 3K but changes mind. No consideration v Homer sees Lisa's life in danger. Asks Abu to save her knowing he'll expect to be paid. After Abu saves Lisa, H promises the 3K. Legally enforceable promise.
  - (d) Pre-existing Contractual/Statutory Duty Rule: CL v UCC

- (i) CL: Promise/act that promisor already has a pre-existing legal duty to perform is not valid consideration (e.g., for a new promise to pay you more).
  - (1) Exceptions:
    - a. addition to or change in performance. E.g., Prince promises to sing for \$25K but then demands \$26K. No new consideration v promises to sing 'seven' for extra \$1K.
    - b. Unforeseen difficulty so severe as to excuse performance. E.g., Sound system doesn't work. King Hall pays Prince an extra \$1K if he'll still perform. Legally enforceable.
    - c. 3<sup>rd</sup> party promises to pay: E.g., same facts above but Dean Perschbacher promises to pay
- (ii) UCC: No pre-existing duty rule. New consideration not required for modification SO LONG AS modifications in good faith.
- (e) Part payment as consideration for release: E.g., promise to forgive balance of debt
  - (i) If payment is due & undisputed: part payment is not consideration for release (Rationale: pre-existing duty).
  - (ii) If payment is not yet due OR disputed: part payment is consideration for release (E.g., Dr. Weirdo owes Mom & Dad \$1600 on July 1. Dr pays them \$200 on June 28. Part payment is consideration for release bc not yet due).
- 4) Consideration Substitutes: Blurb – A promise is legally enforceable even though there is no consideration if a consideration substitute exists
  - (a) Written promise to satisfy an obligation for which there is a legal defense is enforceable w/o consideration (E.g., Action to collect X's debt for \$500K is unenforceable bc SOL is a defense. X promises to pay \$50. Consideration!). **Tip:** usually for lower amount
  - (b) Promissory Estoppel/Detrimental Reliance: 1) Promise 2) Promise was reasonably relied on 3) Reliance was foreseeable & detrimental & 4) Enforcement is necessary to avoid injustice. (E.g., L leases to T promising not to increase rent. T paints building. L increases rent. Promissory estoppels substitute for consideration)
- F) Defenses to Enforcement: Reasons for not enforcing
  - 1) Defendant Promisor's Lack of Capacity:
    - (a) Who Lacks Capacity
      - (i) Infancy: under 18. **Tip:** heavily tested
      - (ii) Mental incompetents who lack ability to understand the agreement
      - (iii) Intoxicated persons – if the other side has reason to know
    - (b) Consequences of incapacity:
      - (i) Right to disaffirm by person w/o capacity. EXCEPTION – legally obligated to pay for necessities (e.g., food, shelter, clothing, medical care) but such liability is based on QUASI-K law- not K law (i.e., prevent unjust enrichment). E.g., Mentally incompetent T leases apt. Doesn't pay. L can't enforce K. Only remedy in quasi-K.
      - (ii) Implied affirmation by retaining benefits after gaining capacity (ratification)
  - 2) Illegal Subject Matter/Purpose
    - (a) Illegal subject matter: if subject matter illegal, agreement non-enforceable/void. E.g., K to kill. Exceptions: one party isn't as culpable as the other, illegality is mere failure to obtain a license where purpose of license is to raise revenue.

- (b) Illegal purpose: Subject matter not illegal but purpose of K is, only person who did not know of illegal purpose may enforce/K voidable. E.g., S buys an airplane ticket from B for purpose of fleeing prison. Subject matter not illegal. Only B may enforce if didn't know of S's purpose.
- 3) Public Policy: Cts refuse to enforce agreement that avoids liability for intentional/reckless conduct or covenants to not compete that are unreasonable w/r/t time & place limits.
- 4) Misrepresentation/Non-disclosure:
  - (a) False assertion/active concealment of fact + induces the P to reasonable rely & K. May be innocent/honest (v torts: scienter unless negligent misrep to particular D). K voidable by innocent party.
    - (i) **Tip:** Heavily Tested. First: Determine if Torts or Ks. (Ks: if about rescinding, it's Ks but if for money damages/status quo ante, it's Torts.
  - (b) Distinguish bw fraud in the factum/fraud in the inducement: party tricked. K is void.
- 5) Duress/Coercion: K is voidable. Usually have a "bad guy" making an improper threat & a "vulnerable guy" w/no reasonable alternative. Requires more than 1 party taking economic advantage of another (E.g., S charging more for what B desperately needs). E.g., S Ks to buy grits from B. S refuses to perform unless B pays more & B has no other source.
- 6) Unconscionability: Ct may refuse to enforce all/part of agreement if unconscionable at the time the K was made. Consider if one party has substantially superior bargaining power 1) unfair surprise or 2) oppressive terms. E.g., Ks w/inconspicuous risk-shifting provisions buried in fine print (i.e., disclaimers of warranty) & Ks of adhesion (take it or leave it"). **Tip:** Not a good answer
- 7) Misunderstanding/latent Ambiguity in Words of Agreement. **Tip:** Not heavily tested - on MBE.
  - (a) No K if: 1) Parties use a material term that is open to at least 2 reasonable interpretations AND 2) Each party subjectively attaches a different meaning to the term AND 3) Neither party knows/has reason to know the term is open to at least 2 reasonable interpretations. (E.g., X knows "Black Pearl" could refer to two ships. K enforceable as to Y's reasonable interpretation).
  - (b) If both parties aware – no K unless both intend the same meaning
  - (c) If only 1 party aware: binding K based on what ignorant party reasonably believes
- 8) Mutual Mistake as to Material Fact Existing At Time of K:
  - (a) No K if 1) both parties are mistaken 2) Mistake regards a basic assumption of fact & 3) Materially affects the agreed exchange & 4) NOT A RISK THAT EITHER PARTY ASSUMES (i.e., seller bears risk to know what she's selling). E.g., mistake about what something is but not what something is worth makes K unenforceable (E.g., Both think it's an original poem by Neruda v S mistakenly sells Hope Diamond for \$5.00).
  - (b) **Tip:** misunderstanding – focus on words in K, misrep – words before K. Mistake – at time of K
- 9) Other types of mistakes
  - (a) Mistake in value/business j'ment NEVER a defense – (EXCEPT if rely on a third party to establish value)
  - (b) Unilateral mistakes: re identity, subject matter or computation, makes K voidable UNLESS nonmistaken party knew/should have known.
  - (c) Mistake by intermediary/transmission (e.g., telegraph co): message operative as transmitted unless receiving party knew/should know of mistake
- 10) **Statute of Frauds. TIP: VERY HEAVILY TESTED: 3 Main Issues**

- (a) Approach:
- (i) Issue One: Is the K w/in the SOF?
  - (ii) Issue Two: If so, is the SOF satisfied
  - (iii) Issue Three: Is there a SOF defense?
- (b) Is the K w/in the SOF? (Effect of person w/claims SOF: this is made up judge!) **MY LEGS**
- (i) A promise to do something/refrain from doing something in consideration of marriage BUT not a promise to marry. E.g., post/pre-nup. X claims that W agreed to renounce any claim to his separate property if he married her
  - (ii) Service Ks not CAPABLE of being performed w/in 1 yr from the time of the K. **Tip:** Heavily tested.
    - (1) Specific time period of more than 1 yr. E.g., P claims that D promised to employ her for 3 yrs & D could terminate her on 30 days notice. SOF applies.
    - (2) Specific time period more than 1 yr from date of K. E.g., Concert hires Madonna to perform 1 yr from next month. SOF
    - (3) If task says nothing about time period: SOF doesn't apply. Imagine what's capable w/unlimited resources (E.g., D hired X to cut down all trees. Not w/in SOF)
    - (4) Lifetime employment Ks not w/in SOF bc could die w/in 1 yr.
  - (iii) Transfers of land. Exception: leases NOT MORE THAN 1 yr. E.g., P claims D agreed to build a house on Blackacre. Not w/in SOF. V P claims D agreed to sell 2 yr easement W/in SOF
  - (iv) Promises by executor to answer for "personally/guarantee personally" the debts of decedent (E.g., Executor promises creditor to personally guarantee payment of estate if creditor releases estate's remaining debt).
  - (v) Guarantee/Suretyship: Promises to Answer For/Guarantee the Debts of Another. EXCEPTION: If benefit for guarantor is the main purpose/primary object of the surety.
    - (1) E.g., S store sells P paint on credit. S alleges X promised to pay for the paint. Not w/in SOF bc X didn't promise to answer for/guarantee P's debts; S Store sells P paint & alleges that X promised to pay for paint if P did not pay. W/in SOF
    - (2) E.g., S store sells P paint to use in painting X's house. S alleges X promised to pay for paint if P didn't. Exception to surety: X's benefit is main purpose. Not w/in SOF
  - (vi) Sale of goods for \$500 OR more AND Leases of goods w/payments totaling \$1,000 or more
- (c) How is the SOF Satisfied (so K enforceable) or is there a SOF defense (so K unenforceable)?  
Depends on type of K
- (i) Performance May be enough to satisfy the SOF: **Tip:** heavily tested
    - (1) Performance & Service Ks: Full performance by either party satisfies the SOF but Part performance doesn't satisfy SOF. (E.g., Ludacris claims he contracted w/Conviser to do the outlines for 5 yrs if Conviser would give him credit. Conviser claims SOF defense. Ludacris' full performance satisfies. But if only 3 yr performance & Conviser fires him, not satisfies SF)
    - (2) Sale of Goods Ks:
      - a. Part performance of a K for the sale of goods satisfies the SOF for delivered goods + to the extent of the part performance. E.g., White girl (B). agrees to buy 1000 saris from me (S). I ship her 500 saris. B claims SOF as defense. Part performance satisfies SOF – but only as to 500 saris (Ct assures of K for 500 saris but not for 1000 saris).

- b. Part performance of a K for the sale of goods DOES NOT satisfy the SOF for undelivered goods. White girl (B) sues me for not delivering 500 saris. I have SOF defense.
  - i. EXCEPTION: Specially manufactured goods – If K is for sale of goods that are to be specially manufactured SOF satisfied as soon as seller makes a “substantial beginning” – i.e., done enough work to make it clear she’s working on something custom made. E.g., Josh orders bible inscribed w/my name. S makes substantial beginning. If Josh revokes, S can sue for breach
- (3) Performance & Transfers of interest in real estate:
  - a. Part performance by buyer of real estate satisfies SOF. Generally any 2/3 – 1) full or part payment 2) possession AND/OR 3) improvements (improvements optional).
  - b. Buyer’s full payment alone doesn’t satisfy SOF (E.g., B orally agrees to buy Blackacre. Pays full & S refuses to sell. S has SOF defense. But if B possessed - S no SF defense).
- (ii) A “Writing” is a Way to Satisfy the SOF (Not just any writing + SOF doesn’t require writing)
  - (1) NON-UCC: Requirements for a “sufficient” Writing
    - a. CL: Contents of the writing or writings must specify material terms: Must name 1) Who BOTH the offeror & offeree is & 2) must be signed by the person asserting the SOF defense
    - b. UCC: Same general rule + the writing must specify a quantity – not necessarily a price.
      - i. A party’s failure to respond to a SIGNED WRITING CONTAINING A QUANTITY TERM w/in 10 DAYS + BOTH parties are merchants: there is a K in place. E.g., S & B merchants. S writes to B, “I will send you 200 lbs of kunki” & signs. B never responds. B’s SOF defense will fail.
  - (iii) Judicial Admission May Satisfy a SOF: If D asserting SOF defense admits in pleadings/T that he had entered into an agreement w/P, the purpose of the SOF (prevent fraud on ct) is fulfilled so no SOF defense. (E.g., D’s depo. P & I contracted but didn’t write it out. No SOF defense”
- (d) Does the SOF apply other than as a defense to enforcement?
  - (i) “Equal dignity” – an authorization to act on behalf of a third party must be in writing if the K to be signed falls w/in the SOF. E.g., Alison arranges for me to sign a 13 mo lease for her. K falls w/in SOF. I need written authorization to act on her behalf
  - (ii) Written E of a modification is required when the modification would cause the K to fall w/in the SOF.
    - (1) E.g, T & L enter into an oral lease of 12 mo. L later claims they agreed to 13 mo. Modification would cause the K to fall w/in the SOF so need written E of modification (but if oral lease was 13 mo & modification to 12 mo, no written E required; B contracts to buy 5 saris for \$500. S later claims B agreed to buy 4 saris for \$499. Modification need not be in writing but if 4 for \$500, w/in SOF.
    - (iii) K provisions requiring all modifications be in writing: CL v UCC. **Tip:** Heavily tested (E.g., Services K says modifications to be in writing. Can orally modify; Selling Datsun – S agrees to \$5,000. B claims they later changed it to \$4,999. No oral modification).
      - (1) CL: ignore K language. Modifications can be oral
      - (2) UCC: Effective unless waived

### III Terms of the K

#### A) Parol Evidence Rule

- 1) General Rule: E of prior or contemporaneous negotiations or oral/written agreements that contradict, modify, or vary contractual terms is inadmissible IF the parties intend the written K to be a complete and final expression of the parties.
  - (a) Irrelevant : whether partial (written & final but not complete) or complete integration or oral/written. **Tip:** wrong answer
  - (b) Merger clause (E.g, “this is the complete & final agreement) highly persuasive but not conclusive.
- 2) When Rule N/A - reformation & rescission (7): 1) formation defects & defenses to enforcement – e.g., fraud, duress, mistake, illegality. 2) Existence of a condition precedent to K. 3) Parties’ intent regarding ambiguous terms 4) Consideration problems 5) Prior valid agreement incorrectly reflected in the writing 6) collateral agreement that doesn’t contradict/vary terms of writing & is not part of main K 7) subsequent modifications
  - (a) E.g., Earlier letters state deal is that S will deliver 12 chickens. B sues for reformation claiming mistake in putting agreement into writing. Earlier writings admissible as E of clerical mistake. **Tip:** Heavily tested
  - (b) E.g., B contends “chickens” means fryers but S says “live ones.” Parol E admissible.
- 3) Adding to Written Agreement: Rule prohibits ct from admitting E of earlier agreements as a source of consistent, additional terms UNLESS written agreement is only a partial integration OR additional terms would ordinarily be in separate agreement (E.g., S Ks in writing to sell B chickens but doesn’t specify how delivered).

4) **Tip:** SOF v Parol Evidence Rule. SOF triggered by no writing. Parol E by integration

#### B) Determining the Terms of the K through the Course of Performance, Course of Dealing & Custom/Usage – Hierarchy. **Tip:** Heavily tested + use phrases in essay

- 1) Step 1: Consider the “course of performance” – what these parties have always done (E.g., S Ks to sell B red widgets. For 12 mo B accepts white widgets).
- 2) Step 2: Course of dealing: Same people. Different K but same subject matter. E.g., Under prior Ks B accepted white widgets. New K. S sends B white widgets based on course of dealing).
- 3) Step 3: Custom/usage

#### C) UCC: “Default” Terms in Sale of Goods Ks

- 1) Delivery Obligations of Seller of Goods if delivery by Common Carrier – 2 possibilities
  - (a) Shipment Ks: Seller completes delivery when 1) delivers goods to common carrier 2) makes reasonable arrangements for delivery & 3) notifies the buyer. **Tip:** if in doubt, choose this
  - (b) Destination/Delivery Ks: Seller does not complete delivery obligation until goods arrive where the buyer is.
  - (c) FOB (city): “free on board.” If city here seller/goods are then it’s a shipment K. If FOB followed by any other city, it’s a delivery K. **Tip:** Heavily Tested
- 2) Risk of Loss: Arise where K has been formed but 1) before buyer receives goods 2) goods are damaged/destroyed & 3) neither the buyer nor the seller is to blame.
  - (a) Effect of risk of loss:
    - (i) If risk of loss is found to be on buyer: buyer must pay full K price for lost/damaged goods

- (ii) If risk of loss is on seller: Buyer has no obligation
- (b) Determining who bears the risk of loss:
  - (i) Agreement of parties control
  - (ii) Breaching party is liable for any uninsured loss, even if breach unrelated to problem. Any breach! (E.g., S was 2 weeks late in shipping Spa Finder certificate. Lost. Spa bears risk)
  - (iii) Delivery by common carrier other than seller: Risk of loss shifts from seller to buyer at time seller completes delivery obligation – if shipment K. (FOB stuff)
  - (iv) If no agreement, breach or delivery by carrier: Risk of loss on the merchant seller UNTIL the buyer's "receipt" of goods. Risk of loss shifts to buyer on tender (Policy: merchants insure).
    - (1) E.g., Mom buys dishwasher from Sears. Sears tells Mom it's ready for pick up. Before Gilbert gets it, lightning strikes & stove damaged. No agreement, no fault, no shipment K. Risk of loss on Sears; E.g., Same facts but Gilbert sells. Risk of loss on Mom bc Gilbert has made a tender - has made goods available.
- 3) Warranties of Quality:
  - (a) Express Warranties: sample/model, Words that promise. Seller's conduct. Contrast w/puffing. E.g., "all steel" v "top quality" (puffing)
  - (b) Implied Warranty of Merchantability: If selling party is a merchant + implied warranty that goods are fit for ordinary purpose
  - (c) Implied Warranty of fitness for a particular purpose: Buyer has a particular person + seller has reason to know of purpose + buyer relies on seller to select suitable goods.
    - (i) **Tip:** Implied in fact Ks wrong answer bc don't exist
    - (ii) **Note:** Merchants in these categories must deal in goods of that kind. E.g., buying gold from a jewelry store v buying a car from a jewelry store – no implied warranties.
  - (d) Contractual Limitations on Warranty Liability
    - (i) Disclaimers (i.e., "there are no warranties") – eliminates implied warranties. Express warranties generally can't be disclaimed.
    - (ii) Disclaiming implied warranties (fitness &/or merchantability): Either disclaimer is conspicuous & explicitly mentions OR through phrases – "as is" or "with faults." **Tip:** Bar.
    - (iii) Limitation of remedies: Does not eliminate warranty but limits recovery. Possible to limit recovery for even express warranties. General test: unconscionability. P/f unconscionable to limit remedy for breach of warranty causing consumer personal injury. (E.g., X buys stove from Sears. K provides that "All parts guaranteed for 2 yrs" & "liability limited to replacement parts/" Defective heating element causes \$100 property damage. Remedies limited. Only replacement parts).

#### IV Performance: Determine if UCC or CL applies

##### A) UCC Sale of Goods Performance issues

- 1) Perfect Tender: applies only to sale of goods. Seller perfectly tenders when performance is perfect – perfect goods & perfect delivery.
- 2) Effect of a less than perfect tender by S: Buyer has right of rejection if 1) w/in reasonable time after delivery of tender and before acceptance 2) Buyer seasonably notifies seller 3) If rejection based on

defect, must notify seller of defect if seller could have cured the defect 4) If merchants + seller requests statement of defects, Buyer must provide.

(a) Buyer's right of rejection single delivery Ks (all goods delivered at once): If non-conforming tender, buyer may 1) reject all 2) accept all or 3) accept any commercial unit & reject rest. Buyer may sue for damages.

(i) Limitations to Buyer's right to reject:

(1) Installment Ks (v single delivery Ks): Ks require/authorizes delivery of goods in separate lots AND to be separately accepted.

a. Buyer has right to reject an installment only if nonconformity substantially impairs value of that installment + can't be cured. (E.g., S agrees to deliver 10 batches of Hoodi to mom each Monday. S delivers on Sunday. B has no right of rejection)

b. The Whole K is breached when nonconformity substantially impairs value of entire K.

(2) Any right to cure Seller may have: S has right to cure when 1) sends non-conforming goods reasonably believing B will accept 2) gives reasonable notice of intent to cure 3) time for performance has not expired & 3) makes a new tender of conforming goods – which buyer must then accept.

a. E.g., B orders 120 red saris. In past, B has accepted blue saris. S sends B 120 blue saris. S notifies B of defect. B may cure; E.g., Rajan orders 120 red saris to be delivered no later than 5/22 for his wedding. S sends 120 blue saris on 5/23. No cure.

(ii) Note: A Seller's failure to make reasonable K w/carrier or notify B guys shipped grounds for rejection only if material loss/delay results

(iii) Buyer's Responsibility of Goods After rejection: hold them w/reasonable care & give seller's time enough to remove. May reship/resell.

3) When B Accepts the Goods:

(a) B accepts when: 1) after reasonable opportunity to inspect, indicates to seller they conform/that she'll keep them despite their non-conformance 2) fails to reject them w/in reasonable time after tender or fails to notify S of rejection – implied acceptance. **Tip** – heavily tested. or 3) B does anything inconsistent w/S's ownership. Note: payment w/o opportunity to inspect isn't acceptance. **Tip**: Heavily tested

(b) Revocation of Acceptance of Goods: **Tip**: Heavily Tested

(i) General rule: Effect of B's Acceptance: B cannot later reject them.

(ii) Limited circumstances: B may cancel K by revoking acceptance of goods if 1) goods' non-conformity substantially impairs value of goods AND 2) excusable ignorance of grounds for revocation or reasonable reliance on S's assurance of satisfaction AND 3) revocation w/in a reasonable time after discovering non-conformity & before any substantial change in goods (not caused by existing defect).

(iii) E.g., In July, B buys a sleeping bag from S. K provides sleeping bag insulated for temperatures below -10 degrees. B uses sleeping bag in summer. In January, B goes camping & realizes bag's not insulated for -10. Tries to return w/in 2 days of trip. Too late to reject but may revoke acceptance. **Tip**: Common fact pattern

B) CL Performance Issues (Perfect tender doesn't apply – only UCC).

1) General rule: If part substantially performs, other party must pay/perform.

## ✓ Remedies for an unexcused non-performance. **Tip: Heavily Tested**

### A) Non-monetary (In Rem) Remedies:

- 1) Specific Performance/Injunction: Only available when damages are inadequate (e.g., subject matter is rare/unique)
  - (a) Ks for Sale of Real Estate/unique goods – may get specific performance (watch for BFP, infra)
  - (b) Ks for Service: No specific performance but possible injunctive (E.g, Can't make Clinton speak at graduation but may prevent her from speaking at another graduation).
  - (c) Equitable Defenses Available:
    - (i) Laches: P has delayed bringing the action + the delay prejudiced the D
    - (ii) Unclean hands: party seeking specific performance is guilty of wrongdoing in transaction she's suing over
    - (iii) Sale of subject matter to a bona fide purchase for value & in good faith
- 2) Reclamation (ONLY APPLIES TO SALE OF GOODS) – right of an unpaid S to get her goods back. 1) B must have been insolvent at time it received goods 2) S must demand return of goods w/in 10 days of delivery/"reasonable time" if B made express representation of solvency before delivery AND 3) B still has goods at time of demand. **Tip: 10 day rule tested.**
  - (a) E.g., 1/15 S sells saris to B on credit. Saris delivered to B 1/22. S learns of B's insolvency. Demands goods back on 1/27. Reclamation
- 3) Right of good faith purchaser in entrustment: 1) Owner leaves her goods w/a person who sells goods of that kind 2) to a good faith purchaser. Then original owner/entruster's rights to goods are cut off. E.g., O takes ring to jewelry shop to clean. Shop sells it to BFP. O has no rights to ring!

### B) Money Damages for Breach of K. **Tip - Essay**

- 1) Policy: to compensate P, not punish D
- 2) General Approach/Measure of Damages: Protection of P's expectation interests. A person making a K expects it will be performed w/o breach. \$ damages will be measured by amount needed to restore P to the same economic position she would have held if K hadn't been breached. "Benefit Bargained for." Fair Market Value – K price.
  - (a) E.g., P Ks to paint O's home for \$1,000. O pays P \$1,000 but P doesn't paint. O has to pay another painter \$1400. O gets \$1400; E.g., S Ks to sell Blackacre to B for \$100K. S breaches. B persuades ct that FMV is 120K. B gets "benefit of the bargain" so gets \$20,000.
- 3) Alternative Approaches:
  - (a) Protection of Reliance Interest: Pay P by putting D in the same economic position as if the K had never happened. Focus on what P lost. E.g., Painter Ks to paint O's house for \$1K. P anticipates making \$200 profit. O breaches after P has spent \$100 for paint. P gets \$100.
  - (b) Protection of Restitution Interests: Restitution: quasi K. Implied in law K. Measure of the damages: the value of the benefit conferred on D. Purpose: prevent unjust enrichment. 1) P conferred benefit on D 2) P reasonable expected compensation 3) D knew/should have known of P's expectation 4) D would be unjustly enriched if don't compensate P.

### C) Damages Rules for Sales of Goods: Art 2 UCC

- 1) Seller breaches, buyer keeps goods: B recovers the fair market value if perfect fair market value as delivered. E.g., S sells B antique car for \$100K & delivers car to B. B pays \$100K. B notes it's not authentic. B keeps the car. FMV of the car is \$90 K. B recovers 10K.
- 2) Seller breaches, seller keeps goods: Market price at time breach was discovered OR replacement K price. E.g., S Ks to Sell B a carpet but doesn't timely deliver (so not perfect tender). B rejects goods. FMV is \$6K/cost to replace is \$6K. B recover \$6.
  - (a) Note: UCC prefers replacement.
- 3) Buyer breaches, buyer has goods: Buyer owes Seller K price. E.g., B Ks w/S to buy a sari. K price for sari is \$500. B doesn't pay for it but keeps it. S recovers \$500.
- 4) Buyer breaches, seller has goods: S gets (K price – market price at time & place of delivery) OR (K price – resale price). OR in some situations – Provable lost profits for lost volume.
  - (a) E.g. Meera Ks to sell white girl 10 saris for \$10,000. S breaches. Meera resells to other white girl for \$9,000. Meera gets \$1,000 (K price – resale).
  - (b) E.g., Dad Ks to sell Acura to Gilbert for \$60,000. Gilbert breaches 1 mo later. FMV is \$50,000. Dad gets \$10,000.
  - (c) Lost Profits for Lost Volume: Triggering facts – 1) A K for sale of regular inventory 2) Breach 3) Resale to someone else at exactly the same price. E.g., Macy's Ks to sell perfumes for \$1000 from their regular inventory. B1 breaches. Macy's sells the same items for the same price to B2. Macy can recover \$1000 from B1. If Macy's profit margin is 20% of the sales price, Macy's may recover \$200.

#### D) Additions and Limitations

- 1) Recover Incidental Damages: Costs incurred in finding replacement performance are always recoverable. No limit on the right to incidental damage. **Tip** – heavily tested. Answers that say, 'incidental damages recoverable only if foreseeable are wrong. E.g., Painter Ks to paint O's house for \$1000 but P breaches. O has spent \$20 buying paint. O recovers \$20.
- 2) Recover Foreseeable Consequential (special) damages: Damages arising from P's special circumstances are recoverable only if D had reason to know of them at the time of the K.
  - (a) E.g., Mill owner Ks w/Carrier to transport a heavy load for \$100. C breaches & Mill owner can't find anyone else. Mill won't be liable unless M had reason to know. **Tip**: Fact pattern will try & confuse you w/saying D also suffered special damages.
- 3) No Recovery For Avoidable Damages: Damages that P could have avoided w/o undue burden on P. Burdens of pleading & proof on D. E.g., Duke hires professor to work for \$100K. Dukes breach. Duke able to show that Dupont – a similar school – offered to hire him for \$80K. P's only damages should be \$20K
- 4) No Recovery or Uncertain/Speculative Damages: **Tip**: Facts often trigger by mention of "new"
- 5) K Provisions Regarding Damages: i.e., liquidated damages provision valid if 1) Damages were difficult to ascertain at time K formed AND 2) amount agreed on was a reasonable forecast of compensatory damages. If amount unreasonable, cts consider this as penalty/rather than attempt to compensate & so provisions void.

## VI Excuse of Non-performance of K because of Something That Happened After K was Made – Discharge

### A) Excuse Because Other Party Improperly Performs

- 1) CL & Material Breach Rule: Only a material breach/no substantial performance by one party excuses the other party's non-performance (where there is substantial performance, there is no material breach).
    - (a) Determining what constitutes a material breach: a question of fact. Consider – the amount of benefit the non-breaching party received, the adequacy of damages to 3<sup>rd</sup> party, the extent of part performance, the hardship to the breaching party, negligent/willful breach, the likelihood that the breaching party will perform.
      - (i) If part performance – if less than ½ no substantial performance/breach. If more than ½ substantial performance. E.g., Painter Ks to pay 10 apts for O for 10K. P paints 3. Breach.
        - (1) Exception: Divisible Ks. May only recover if material breach on per unit basis. E.g, same facts but Painter Ks to pay 10 apts each for \$1000 each. Breach considered per apt.
        - (ii) Timeliness of performance generally not a material breach unless not completed in reasonable time/K expressly requires.
        - (iii) Note: may recover \$ damages for any breach – even if not material
      - (b) E.g., O hires painter to paint house white for \$1000. Painter paints purple. Material. \$ damages v painter merely forgot to paint a closet or uses Cohoe instead Redding copper when comparable.
  - 2) UCC Art 2 follows Perfect Tender Rule (supra) NOT material breach rule.
- B) Excuse because of non-occurrence of a condition
- 1) What a condition is: An event both parties agree on where the occurrence/non-occurrence of creates, limits or extinguishes the absolute duty to perform. A promise modifier. Trigger words: “if,” “only if,” “provided that,” “so long as,” “subject to,” “in the event that,” “unless,” “when,” “until” & “on condition that.” **Tip: Memorize**
    - (a) Types of conditions:
      - (i) Condition precedent: Condition must occur before performance is due. When condition occurs, performance is due.
        - (1) E.g., Conditional Acceptance - S offers to sell B his home for \$100K. B responds he will buy if he can obtain a mortgage at no more than 6%.” **NO K**; E.g., S & B enter into an agreement that states that B will buy S's house for \$100K if B can obtain mortgage at no more than 6%. No K.
    - 2) General Rule: Strict compliance w/conditions required . E.g., If B gets a mortgage for 6.1% condition hasn't been satisfied so no duty to perform. Can't be satisfied by comparable - Cohoe Copper not ok
    - 3) How a Condition May be excused: (evolving judicial hostility) - These are discretionary:
      - (a) Good faith/avoidance of forfeiture: E.g., B Ks to build O's house. K provides O's payment is conditioned on B using Reading pipe but B uses comparable Cohoe pipe. Only good faith basis to excuse non-occurrence of condition
      - (b) Waiver/estoppel:
        - (i) Estoppel: Statement by the person protected by the condition before the conditionin event was to occur + requires reliance. E.g., B Ks to build. K provides for monthly certs. O tells B certs unnecessary. Can't then refuse to pay w/o certs. Estopped.
        - (ii) Waiver: A statement by the person protected by the condition after the conditioning event was to occur + does not require reliance E.g., B Ks to buy S's house. K states that sale

conditioned on B's getting a mortgage interest rate of less than 6%. B doesn't succeed. B wants the house. S refuses to sell & B can sue on K

- 4) Excuse of performance by reason of other party's anticipatory repudiation: unambiguous statement or conduct indicating that 1) the repudiating party will not perform 2) prior to the time that performance was due.
  - (a) Effect: Excuse the other party's duty to perform. E.g., P contracts to paint O's house for a unique autographed picture of Madonna. Before P finishes, O sells photo to Sting. Anticipatory repudiation by conduct. P has no duty to paint.
  - (b) Generally gives rise to an immediate claim for damages for breach UNLESS claimant has already finished her performance. E.g., Painter Ks to paint O's house for \$1K w/payment to be made on July 13. Before P finished O tells P she's not going to pay. P can sue. But if P already finished painting, must wait till July 13 to sue.
  - (c) Anticipatory repudiation may be reversed/retracted so long as no material change in position by other party + timely retracted: duty to perform is reimposed but performance may be delayed until adequate assurance given (like insecurity)
- 5) Insecurity: If words/conduct of one party give "reasonable grounds for insecurity" then other party may demand adequate assurance + suspend performance until it gets such assurance if commercially reasonable. E.g., B Ks to buy from S. B learns that S was late on all deliveries.
- 6) Excuse by Reason of a Later K
  - (a) Rescission/cancellation:
    - (i) Mutual Rescission: Both parties may mutually agree to cancel if performance is still executor: it is still remaining from each of the K parties. Effect: No recovery for partial performance.
      - (1) **Exception**: Where 3<sup>rd</sup> party beneficiary's rights have vested, mutual rescission by promisor & promisee doesn't discharge K.
      - (2) E.g., Painter contracts to paint O's house for \$1,000. Before P completes painting, O & P agree to rescind. Rescission is valid & P can't recover under K law from O (may under quasi); E.g., P finished painting. No rescission.
    - (ii) Unilateral rescission: only where party has adequate grounds (E.g., mistake, misrepresentation, duress)
  - (b) Accord and Satisfaction
    - (i) Meaning of Accord & Satisfaction
      - (1) Accord: one party to a K agrees to accept performance different from that originally promised in satisfaction of an existing obligation. Usually requires consideration. **Tip**: To decide bw accord/satisfaction & modification of K, trigger words of accord/satisfaction are "if" & "then"
    - (ii) Effect of Accord & Satisfaction:
      - (1) If new agreement (accord) is performed (satisfaction), performance of original obligation is excused.
        - a. E.g., D borrows \$1000 from C. Later D & C agree that if D delivers 20 widgets then debt will be excused. D delivers 20 widgets & C still sues for \$1000. Result: non-performance of original obligation excused bc D satisfied (performed) the accord (new agreement).

- (2) If accord is not satisfied, other party may sue on EITHER the original obligation OR the accord – but NOT BOTH (E.g., previous e.g., if D failed to deliver widgets, C may sue for either \$1K or widgets – not both). **Tip:** Heavily tested.
- (c) Modification: Substituted Agreement by the parties to an existing obligation + to accept a different agreement + in satisfaction of the existing obligation.
- (i) Distinction bw accord/satisfaction: Accord/satisfaction parties intend the old agreement to stay until satisfaction. W/modification, parties intend the new agreement to replace the old
- (ii) CL v UCC: CL modification requires consideration. UCC no consideration to make modification enforceable so long as good faith
- (d) Discharge by Novation: A party may be discharged by novation when the new K substitutes a party for one of the parties to the original K. **Tip:** Heavily tested
- (i) Requirements (4): 1) previous valid K 2) agreement among all parties, including the new party 3) immediate extinguishment of contractual duties bw the original and contracting parties & 4) a valid new K
- (ii) Liability after novation: Party who is replaced is no longer liable. E.g., P constraints to paint O's house. P, O & X agree X will do the work instead of P. X doesn't perform. O can't recover from P.
- (iii) Distinguish novation from delegation: Delegation does not require agreement of both parties + doesn't excuse non-performance (E.g., Paints Ks to paint O's house. W/o consulting O, P asks X to do work & X agrees. X doesn't perform. O may recover from P).
- (e) Discharge by Release: must be in writing + new consideration/promissory estoppel
- C) Excuse of Performance by Reason of a later, unforeseen event
- 1) Something that happened after K formation but before completion of performance 2) That was unforeseen 3) that makes performance impossible, impracticable, or frustrates purpose is grounds for excuse.
- (a) Impossibility: Must be objective. Can't be done.
- (b) Impracticability: Can only be done w/extreme & unreasonable difficulty & expense.
- (c) Frustration of purpose
- 2) Damage or destruction of subject matter of K AFTER K
- (a) E.g., Impossibility. P Ks to paint O's house but before performance it burns down. Both discharged;
- (b) E.g., Impracticability. B contracts to build a house for O for 100K. Before performance, house burns down. B not excused. No discharge. Does not rise to level of commercial impracticability
- (c) Seller's Risk of Loss/Destruction: when Seller's duty to perform (i.e., tender goods) discharged. E.g., Seller's BMW is destroyed by flash flood (discharge) v seller sandwiches destroyed by flash flood (no discharge bc seller could deliver other ones).
- (d) Buyer's Risk of Loss/Destruction: If unforeseen events occur after loss has passed to buyer, S's nonperformance excused. E.g., S tells B it's available for pick up. S has tendered it to buyer. Flash flood – B bears risk of destruction
- 3) Death AFTER K
- (a) General Effect of Death of K obligations: Death does not make a person's K obligations disappear. Can recover from decedent's estate. EXCEPTION: Death of a party to the K is a "special person"

(E.g., UC Davis Ks to have Clinton speak at graduation ceremony. Clinton dies. Can't sue Clinton's estate. Her non-performance is excused)

4) Subsequent Law/Regulation

- (a) Later law makes performance of K illegal - excuse by impossibility: K w/illegal subject matter is void. E.g., X Ks w/Y to dance nude. Law makes nude dancing illegal. X's nonperformance excused
- (b) Later law makes mutually understood purpose of K illegal: excuse by frustration of purpose. E.g., X Ks w/Dr. 90210 for plastic surgery so he will be "lean mean nude dancing machine." Statute makes nude dancing illegal. Duties discharged. Still possible so not impossibility.

VII Third Party Problems: Beneficiary, Assignment or Delegation. **Tip:** Very heavily tested

A) Third Party beneficiary:

1) Vocabulary:

- (a) Promisor: one who is making the promise that benefits the 3<sup>rd</sup> party beneficiary (State Farm)
- (b) Promisee: one who obtains the promise that benefits the 3<sup>rd</sup> party beneficiary (Me)
- (c) Third party beneficiary: one is Not a party to the K but is able to enforce a K others made for her benefit. (Mom). May be:
  - (i) Intended: only intended have K rights. Usually mentioned in the K. Consider if
    - (1) Intended donee beneficiary: strong presumption. (Mom)
    - (2) Intended creditor beneficiary: person is creditor of promisee
  - (ii) Incidental: Generally not mentioned in the K

2) Efforts to Cancel/Modify: Promisor & Promisee not permitted to modify/cancel K w/o 3<sup>rd</sup> party beneficiary's consent UNLESS K otherwise allows if: 3<sup>rd</sup> party beneficiary's rights have "vested" - she knows of AND has relied on OR assented as requested.

3) Who can Sue Whom? **Tip: Very heavily tested.**

- (a) Beneficiary may sue promisor (E.g, Mom, below)
- (b) Promisee may recover from promisor (Me, below)
- (c) Donee beneficiary can not recover from promisee. **Tip: MOST** heavily tested
- (d) Creditor beneficiary can recover from promisee but ONLY on pre-existing debt

4) Defenses: If third party beneficiary sues promisor, promisor may assert any defenses it would have if the promisee had sued. **Tip:** Heavily tested.

5) Examples:

- (a) E.g., Meera takes out State Farm insurance policy for Mom to pay on Meera's death. State Farm refuses to pay. Mom has claim against State Farm. E.g., Shiran Ks w/Chippendales to do a strip dance for her friend. Her friend may sue Chippendales if it breaches.
- (b) E.g., Shiran & Chippendales rescind before friend knows. OK. But if friend invites others in reliance, not OK.
- (c) E.g., Friend may sue Chippendales, Shiran may sue Chippendales, Friend can't sue Shiran (bc donee) but if Shiran owes friend \$100 in debt before contracting w/Chippendales to provide dance for friend to satisfy the debt + Chippendales breaches, friend may sue Shiran on \$100 (creditor, pre-existing debt).

B) Assignment of Rights

1) Vocabulary:

- (a) Assignment: Occurs when a valid K exists between two parties and one of the parties later transfers rights/benefits under the K to a third party.
    - (i) Promises to collect/pay aren't assignments: E.g., Batman promises to collect money from Gotham (for his security services) & pay it to Robin. No assignment bc no transfer of rights. Robin is 3<sup>rd</sup> party beneficiary; E.g., Batman promises to provide security for Gotham & gets 300K. Transfers rights to K under Robin. Assignment.
  - (b) Assignor: Party to the K who later transfers rights under the K to another
  - (c) Assignee: Not a party to the K but able to enforce the K because of the assignment
  - (d) Obligor: The other party to the K
- 2) Requirements for Assignment:
- (a) General Rule: Consideration not required for assignment but gratuitous assignments always revocable
    - (i) Exception: Gratuitous assignments may be non-revocable if: subject matter of a writing delivered to the assignee, assignee has received some indicia of ownership, or assignee has relied on assignment in way that is reasonable, foreseeable & detrimental.
- 3) General Rule: Cts favor assignability of K rights. But some limitations
- (a) Language of prohibition: Assignor is liable for breach of K BUT assignee who does not know of prohibition may enforce the assignment. E.g., K provides "rights are not assignable." Batman assigns right to 300K payment to Robin who does not know. Batman in breach but Robin may enforce.
  - (b) Language of invalidation: No breach by the assignor AND no rights in assignee. E.g., same K but says "all assignments of rights under this K are void." Batman not in breach & Robin no K rights
  - (c) Common Law
    - (i) General Rule: Even if a K does not in any way limit the right to assign, an assignment that substantially changes the obligor's duties is prohibited. **Tip:** Heavily tested
      - (1) Assignment of rights to payment – never a substantial change (E.g., Batman assigns rights to \$ to Robin. Valid assignment)
      - (2) Assignment of rights to K performance (other than the right to payment) is usually a substantial change. **Tip:** Heavily Tested. E.g., Gotham assigns its rights to security services to Metropolis. Invalid.
- 4) Rights of Assignee
- (a) Assignee can recover from the obligor. E.g., Robin may sue Gotham for not paying if assignment
  - (b) Assignor for consideration CAN NOT recover from the obligor, **Tip:** Heavily tested.
    - (i) E.g., Batman assigns K w/Gotham to Robin for \$10. Gotham doesn't pay Robin. Batman can't recover from Gotham. Contrast w/3<sup>rd</sup> party beneficiary where promisee may enforce against promisor.
  - (c) Defenses: Obligor has same defenses against assignee as it would have against assignor. E.g., Robin seeks to collect. Obligor can defend by asserting Batman hasn't performed.
  - (d) Payment by obligor to assignor is effective until obligor knows of the assignment E.g., Gotham doesn't know about assignment & so pays Batman. But if knew about assignment, must pay Robin
  - (e) Modification bw obligor & assignor effective IF obligor did not know of assignment

- (f) If assignment made for value/consideration: Implied warranties in assignor. Assignor warrants 1) the right assigned actually exists 2) the right assigned is not subject to any defenses by obligor & 3) assignor will do nothing to impair value of the assignment. No warranty about what obligor will do.
  - (i) E.g., X signs a note promising to pay Y \$1000. Y assigns note to Z for \$800. X was infant when signed note & refuses to pay Z. Z may sue Y. Warranty # 2
  - (ii) E.g., X assigns right to royalties to Y for \$1000. X then releases publisher from any obligation to pay royalties. Warranty #3.
  - (iii) E.g., X assigns right to royalties to Y for \$1000. 2 days later publisher declares bankruptcy. X not liable bc no implied warranty about what obligor will do.

5) Multiple Assignments:

- (a) Gratuitous Assignments: **Tip** – heavily tested
  - (i) General Rule – last in time assignee wins bc later gift assignment revokes earlier gift (since gift assignments freely revocable) if all assignments gratuitous. E.g., Batman assigns right to payment to Red Cross. Then makes same assignment to Blue Cross. Blue Cross has claim.
    - (1) Exceptions: Non-revocable gift assignment takes priority over a later assignment
- (b) Assignments for Consideration:
  - (i) General Rule: First assignee for consideration wins. E.g., Above facts but for consideration. Red Cross would win.
  - (ii) Very Limited Exception: A subsequent assignee takes priority over an earlier assignee for value only if he both 1) does not know of the payment AND is the first to obtain payment, a j'ment, a novation OR indicia of ownership. "four horsemen" rule.
    - (1) E.g., Batman assigns to Robin for consideration & then to Red Cross for consideration. Red cross doesn't know of the assignment to Robin & is the first to notify Gotham (the obligor) he is an assignee. Robin has claim; E.g., Batman assigns to Robin for consideration & then to Red Cross for consideration. Red Cross did not know of assignment to Robin & got paid. Red Cross has claim

C) Delegation of Duties

- 1) Vocabulary
  - (a) Delegation: Occurs when a party to a K transfers duties/burdens under that K to a third party
  - (b) Delegating party: the one who transfers duties/burdens
  - (c) Delegatee: the third party on whom duties/burdens are transferred
  - (d) Contrast w/assignment: In assignment, assignor transfers rights/benefits of K
- 2) Often, contracting party makes both an assignment & a delegation:
  - (a) E.g., Painter contracts with Owner to paint Owner's home for \$1000. Painter & X agree that X will do the painting (transferring duties) & collect the \$1000 from O. Both assignment & delegation; E.g., same facts but P agrees to pay X the \$1000 for painting instead of X collecting \$1000 from O. Now a delegation for consideration
- 3) What Duties Are Delegable
  - (a) General Rule: contractual duties are delegable.

- (b) Limitations: Permitted unless 1) K prohibits delegations or prohibits assignments OR 2) K calls for very special skills or 3) person to perform has very special reputation E.g., can't delegate teaching tennis class to beginner v #1 ranked tennis player, to bad singer v Bocelli.
  - (i) Note: if both parties agree: novation.
- 4) If the third party fails to perform:
  - (a) Delegating party ALWAYS remains liable
  - (b) Delegatee liable ONLY if she received consideration from the delegating party